

Supreme Court, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No.

78-949

EVELYN LOWITT,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE
DIVISION**

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On the Petition.

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vs.

STATE OF NEW JERSEY,

Respondent.

—◆—
**PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY, APPELLATE
DIVISION**

Evelyn Lowitt petitions for a Writ of Certiorari to review the judgment of the Appellate Division of the Superior Court of New Jersey, affirming petitioner's judgment of conviction for murder and for conspiracy to commit murder.

Opinions Below

The opinion of the Appellate Division has not been officially reported (App. A. *infra*, pp. 1-4a). An order was

entered by the Supreme Court of New Jersey denying petitioner's petition for certification (App. B. *infra*, p. 5a). This order has not yet been officially reported.

Jurisdiction

The judgment of the Appellate Division affirming petitioner's conviction was entered on June 19, 1978. The order of the Supreme Court of New Jersey denying petitioner's petition for certification was entered on September 19, 1978. Petitioner's judgment of conviction was entered on November 24 and December 17, 1976 (App. C. *infra*, pp. 6-7a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257 (3).

Question Presented

Did the trial court's denial of petitioner's request for a short continuance to allow petitioner to secure the testimony of the only eyewitness to the murder with which the petitioner was charged violate the petitioner's right to present a defense, as guaranteed in the Compulsory Process Clause of the Sixth Amendment and in the Due Process Clause of the Fourteenth Amendment to the Constitution in view of the presence of the following factors:

(a) It was expected that the State would call the witness to testify during its case. The witness had testified at the trial of the other alleged co-conspirators and had been listed as a potential witness by the State;

(b) The witness had at one time during petitioner's trial been certified to be a material witness by the trial court;

(c) The whereabouts of the witness in Florida had been located;

(d) The statutory procedure to effectuate the witness' production at the trial had been commenced and the sheriff in Florida had advised petitioner's counsel that he anticipated serving said witness with appropriate papers the evening of the very day that the motion for a continuance was denied;

(e) The continuance would have at most been for only two trial days.

(f) The witness may have been able to corroborate petitioner's theory that the decedent was killed during a robbery attempt instead of by individuals hired to kill the decedent, as charged by the State;

(g) The heart of the State's case was based upon testimony from admitted accomplices, one of whom was not indicted and the other of whom testified against petitioner in exchange for the dismissal of the murder charge against him; and

(h) Petitioner testified and denied the charge against her.

Constitutional Provisions Involved

The principal constitutional provisions involved are the Sixth Amendment and Section 1 of the Fourteenth Amendment of the United States Constitution.

Amendment VI provides as follows:

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy public trial, by an impartial jury of the State and district wherein the crime shall be committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the

accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Amendment XIV, Section 1 provides as follows:

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case

Petitioner was charged with the July 5, 1975 murder of her husband, Oscar Lowitt, and with conspiring with O'Neal Davis and Sylvester Cholmondeley to murder her husband.

Cholmondeley and another alleged accomplice, Vanessa Williams, were tried and convicted in July 1976, on charges substantially the same as those brought against petitioner. O'Neal Davis was also indicted on charges of murder and conspiracy to commit murder. Davis pleaded guilty to the conspiracy charge and in return for the dismissal of the murder charge agreed to testify against Cholmondeley and Williams at their trial and against petitioner at her trial. O'Neal Davis and another alleged but unindicted conspirator, Bennie Lee Frazier, were the only two witnesses against petitioner.

A jury trial was held for petitioner on November 17, 18, 19, 22, 23 and 24, 1976. The jury returned a guilty verdict for first degree murder and for conspiracy. Petitioner was sentenced on November 24 to life imprisonment for the murder conviction. On December 17, 1976, petitioner was sentenced to a consecutive term of two to three years at the New Jersey Correctional Institution for Women at Clinton. After a brief period of incarceration, petitioner was admitted to bail by the Appellate Division and continued free on bail until October 24, 1978, at which time an order was entered by the Honorable William J. Brennan, Jr., Circuit Justice, denying petitioner's application to continue bail.

At the petitioner's trial, the State's theory was that she hired Cholmondeley and Davis to murder her husband because she was jealous of a purported affair he was having in Florida with Miss Marilyn Kelly. Petitioner testified and denied the charges against her. Petitioner's theory was essentially that her husband was murdered during a robbery.

There was only one known eyewitness to the shooting, an individual named Manuel Ceden. Petitioner fully expected that Ceden would be produced at the trial by the State. The State had called Ceden at the trial of Cholmondeley and Williams. Moreover, it named Ceden as its second potential witness on the list of names of possible witnesses provided to petitioner in pre-trial discovery. On the morning of Wednesday, November 17, 1976, at the time of jury selection, petitioner learned for the first time that Ceden would not be called by the State. At that time, petitioner began a series of intensive efforts to secure the presence of Ceden at the trial (TC30-11 to 34-1).*

* TC refers to transcript of request for continuance.

At approximately 5:00 p.m. on Thursday, November 18, 1976, the trial judge signed a certification pursuant to New Jersey's Act to Secure the Attendance of Witnesses from without the State in Criminal Proceedings, N.J.S.A. 2A:81-18, *et seq.*, in which he certified that "Manuel Felix Cedenó is a material and necessary witness in the matter of the State of New Jersey vs Evelyn Lowitt and that his presence in New Jersey will be required November 23 and 24, 1976 . . ." A defense attorney left for Florida where an order was entered on November 19, 1976, by a Circuit Court Judge in Broward County requiring Cedenó to show cause why he should not be compelled to appear and testify at petitioner's trial. During the course of the trial the Court was informed that this order was obtained (TC34-1 to 36-10).

Considerable difficulty was encountered in locating Cedenó. On November 22, 1976, the Florida order was extended to run through the period ending on Friday, November 26, 1976 (TC37-8 to 38-24). Because of the continuing difficulty in locating Cedenó, petitioner moved, on the afternoon of Tuesday, November 23, 1976, to continue the trial until Monday, November 29, 1976, so that Cedenó could be produced as a witness (TC2-6 to 9).

The trial court heard lengthy argument on this request (TC2-6 to 43-8). During the course of the argument, a brief recess was taken after which petitioner's counsel informed the trial court that they had just spoken with the first deputy sheriff of Broward County and that the sheriff said that he knew where Cedenó was living, that he knew that Cedenó had not left the area, and that he expected to serve Cedenó with the court order that evening "without fail" (TC41-1 to 43-8). Nevertheless, the trial court then denied the request for a continuance (TC43-56).

In denying the continuance request, the trial judge stated that he doubted whether Cedenó was actually a

material witness because he could not offer any direct evidence as to defendant's guilt (TC43-11 to 19). The trial judge said that he was "not satisfied that" Cedenó "could ever be produced" and that he would not continue the matter until the following Monday without any such "guarantee". He also noted that he had observed the demeanor of Cedenó when Cedenó testified at the trial of Cholmondeley and Williams and that he believed that Cedenó would not readily comply with the order to appear in New Jersey (TC53-23 to 56-14).

After the trial court denied petitioner's request for a continuance, the trial resumed. On the following day, Wednesday, November 24, 1976, summations and the trial court's charge were delivered, and the jury verdict was rendered. An appeal for petitioner's conviction was filed with the Appellate Division of the Superior Court of New Jersey. In Point I of petitioner's brief to the Appellate Division, she made the following argument:

"The trial court's refusal to grant the motion for a continuance to allow defendant [the petitioner herein] to obtain the testimony of Manuel Cedenó constituted a violation of the defendant's constitutional right to present a defense and was a prejudicial abuse of discretion."

Petitioner based this point upon her rights as set forth in the Compulsory Process Clause of the Sixth Amendment and in the Due Process Clause of the Fourteenth Amendment of the United States Constitution.

The Appellate Division found this contention was "clearly without merit". (See App. A. *infra*, p. 3a).

Upon the Appellate Division's affirmance of her judgment of conviction, petitioner filed a petition for certification in the Supreme Court of New Jersey. In that peti-

tion, petitioner again argued that under the circumstances of the within case, petitioner's constitutional right to present a defense was violated by the trial court's refusal to grant a short continuance for the purpose of securing the attendance at the trial of the sole eyewitness to the murder. That petition was denied by the Supreme Court of New Jersey.

REASONS FOR GRANTING THE WRIT

This case embraces an issue which has been largely unexplored by this Court and other courts throughout the country—the constitutional dimension which is involved in every criminal defendant's request for a continuance. This issue has never been specifically addressed by this Court. Furthermore, petitioner respectfully submits that the decision of the court below is not in accord with other decisions of this Court which bear on the issue involved herein.

The Court has consistently held that an accused's right to present a defense is constitutionally protected by the guarantee of compulsory process for the production of witnesses, as set forth in the Sixth Amendment, and by the Due Process Clause contained in the Fourteenth Amendment. *Chambers v. Mississippi*, 410 U.S. 284; *Washington v. Texas*, 338 U.S. 14; *Faretta v. California*, 442 U.S. 806. This Court has found that the right to present a defense is fundamental, *Chambers v. Mississippi*, *supra*, 410 U.S. at 302, and thus it can be infringed upon only by governmental interests which are of a compelling nature.

There can be no doubt that the scheduling of criminal trials can have a great impact upon an accused's ability to present a defense. Consequently, there has developed

a line of decisions derived from the above principles reflecting the fact that requests for reasonable continuances now possess a constitutional dimension. See *People v. Foy*, 32 N.Y. 2d 473, 299 N.E. 2d 664, 346 N.Y.S. 2d 245 (1973); Clinton, "The Right to Present a Defense: An Emergent Constitutional Guarantee in Criminal Trials", 9 Indiana L. Rev. 711, 850 (1976).

In *Foy*, after the State rested, the defendant sought an adjournment in order to secure the attendance of an alibi witness, who had been present in the courtroom on the previous day but who had been unable to take another day off from his job. The trial judge denied the request for the continuance. On the appeal the State argued that the witness' testimony was not material to the alibi defense and that defendant had not made a diligent effort to guarantee the witness' presence. The appellate court stated that although the State's argument had some merit, that the trial judge's discretion in deciding whether or not to grant an adjournment is to be narrowly construed when a delay is requested in order to protect fundamental rights. The *Foy* Court cited *Chambers v. Mississippi*, *supra*, for the principle that the right of an accused to present witnesses in his own defense is one of our most fundamental rights and concluded that the denial of the motion for a continuance deprived the defendant of that right.

As described above, there was only one witness, Manuel Cedeno, to the shooting of the decedent in the instant matter. When it was discovered at the time of the jury selection that the witness would not be called by the State, despite the fact that he had testified for the State at the trial of Williams and Cholmondeley and had been named as a possible witness by the State on pre-trial discovery, petitioner began a series of intensive efforts to obtain the

presence of Cedenó at the trial. Cedenó's presence was obviously essential because his observations could possibly have established that the decedent was shot during a robbery, as petitioner insisted, instead of pursuant to a pre-arranged plan allegedly initiated by petitioner. The importance of this testimony cannot be overstated in view of the fact that the State's case rested upon the testimony of admitted accomplices whose testimony was denied by petitioner. One of these accomplices was not indicted and the murder charge against the other accomplice was dismissed in exchange for his testimony.

During petitioner's trial, she moved for a continuance in the afternoon of Tuesday, November 23, 1976, until Monday, November 29, 1976 so that she could be certain that she had sufficient time to secure the presence of Cedenó, who the trial judge had certified as a material witness. Despite the fact that defense counsel informed the trial judge that they had been advised by the deputy sheriff of Broward County, Florida, that Cedenó should be served that evening with the appropriate papers, the trial judge denied the request for the continuance. In so doing, the trial judge stated that he had already observed Cedenó at Cholmondeley's previous trial, which was not attended by petitioner or her counsel, and that he believed that Cedenó would not willingly return to New Jersey.

If, in fact, there had been a continuance to Monday, November 29, 1976, this would have involved, at most, a delay of two trial days since Thursday, November 25, 1976 was Thanksgiving. Surely the delay of two days was insignificant when balanced against the defendant's fundamental constitutional right in the context of a murder trial where she faced and received a sentence of life in prison. This is particularly true in view of the inherently weak testimony against her.

This Court has never squarely ruled upon the question raised in this petition. Furthermore, petitioner respectfully submits that the courts below have rendered a decision which was not in accord with the fundamental principles set forth in the *Chambers*, *Washington* and *Faretta* decisions, as applied in *People v. Foy*, *supra*.

Hence, petitioner respectfully submits that this is an appropriate case for this Court to consider the application of the above principles to her request for a continuance. It should be emphasized that the issue raised by petitioner is one which affects all requests for continuances in criminal trials throughout this country. By granting this petition, the Court will be able to consider the issue not only as it applies in the case at bar, but it will also have the opportunity to set guidelines for future actions.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

JOEL D. SIEGAL,
Counsel for Petitioner.

HELLRING, LINDEMAN, GOLDSTEIN
& SIEGAL,
Attorneys for Petitioner.

CHARLES ORANSKY,
On the Petition.

[APPENDICES FOLLOW]

APPENDIX A

**Opinion of the Superior Court of New Jersey,
Appellate Division**

SUPERIOR COURT OF NEW JERSEY

APPELLATE DIVISION

A-1081-76

STATE OF NEW JERSEY,

Plaintiff-Respondent,

—VS.—

EVELYN LOWITT,

Defendant-Appellant.

Argued: May 30, 1978.

Decided: June 19, 1978.

Before Judges Fritz, Ard and Gaulkin.

On appeal from the Superior Court of New Jersey,
Law Division, Monmouth County.

Mr. Joel D. Siegal argued the cause for the appellant
(Messrs. Hellring, Lindeman, Goldstein & Siegal,
attorneys; Mr. Charles Oransky on the brief).

Ms. Sara A. Friedman, Deputy Attorney General,
argued the cause for respondent (Mr. John J. Deg-
nan, Attorney General of New Jersey, attorney).

PER CURIAM

Appendix A

Defendant Evelyn Lowitt was convicted by a jury of first degree murder of her husband (N.J.S.A. 2A:113-1 and 2A:113-2) and conspiracy to murder him (N.J.S.A. 2A:98-1). She was sentenced to life imprisonment on the murder conviction and to a consecutive term of two to three years on the conspiracy conviction. On this appeal she asserts the following:

- (1) The trial court's refusal to grant the motion for a continuance to allow defendant to obtain the testimony of Manuel Cedenio constituted a violation of defendant's constitutional right to present a defense and was a prejudicial abuse of discretion.
- (2) The trial court committed reversible error by admitting statements by Frazier and Davis about defendant's alleged request of Frazier that he buy defendant a gun five years before the date of the murder.
- (3) Defendant was deprived of her constitutional rights to present a defense and to cross-examine and confront the witnesses against her by the trial court's limitation of the cross-examinations of Davis and Kelly.
- (4) The trial court deprived defendant of her right to a fair trial by mistreating defense counsel in front of the jury.
- (5) Defendant was denied her right to a fair trial because of the statements made by the assistant prosecutor (raised in part below).
- (6) Prejudicial error was committed when the State was permitted to introduce hearsay testimony concerning defendant's alleged emotional state (raised in part below).

Appendix A

- (7) The cumulative effect of the trial court's errors is so great as to require a reversal.
- (8) Defendant was improperly sentenced to a consecutive prison term for her conviction for conspiracy to commit murder.

We have reviewed these contentions in the light of the entire record, and find all of them to be clearly without merit. R. 2:11-3(e)(2).

In a supplemental memorandum, defendant further urges error in the trial court's permitting the State to elicit from its witness Davis that he had pleaded guilty to conspiracy to murder defendant's husband. The assertion of error was not made below, but is advanced here on the basis of *State v. Stefanelli*, 153 N.J.Super. 452 (App. Div.), certif. granted 75 N.J. 4 (1977), decided after the trial was completed. Defendant claims that from the proof of Davis' plea of guilty to the very conspiracy alleged against defendant the jury "could not help but draw the inference that because one party pleaded to a conspiracy that the conspiracy actually existed."

In *Stefanelli* the court noted that the prosecutor had argued to the jury that they ought to believe the testimony of one Cicala, who had pleaded to the same conspiracy charged against Stefanelli; to disbelieve him, the prosecutor said, would mean that Cicala had "pleaded guilty to something that didn't happen." This argument, the court concluded, made it "fairly apparent that the testimony of Cicala with respect to the guilty plea was used for the purpose of impressing the jurors of the existence of the conspiracy." 153 N.J.Super. at 459. That improper use, which was not corrected by any instruction of the trial court, was found to be prejudicial error.

Appendix A

In the present case, the record carries no suggestion that the State's introduction of Davis' plea was used for any purpose other than to disclose a criminal conviction which might bear on Davis' credibility as a witness. The propriety of that use of the conviction is beyond question. See N.J.S.A. 2A:81-12; *Evid. R.* 20; *State v. Sands*, — N.J. — (1978); *State v. Holley*, 34 N.J. 9, 13, cert. den. 368 U.S. 854, 82 Sup. Ct. 89, 7 L.Ed. 51 (1961). Moreover the trial judge below specifically instructed the jury, both immediately upon Davis' acknowledgement of his plea and in the charge at the close of all the evidence, that his plea was to be considered only as bearing upon his credibility as a witness. Proof of Davis' plea having been offered for and limited to a proper purpose, its admission was not error.

The judgment of conviction is affirmed.

APPENDIX B

**Order Entered by the Supreme Court of New Jersey
Denying Petition for Certification**

SUPREME COURT OF NEW JERSEY

C-1 SEPTEMBER TERM 1978

STATE OF NEW JERSEY,

Plaintiff-Respondent,

v.

EVELYN LOWITT,

Defendant-Petitioner.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon ORDERED that the petition for certification is denied with costs.

WITNESS, the Honorable Richard J. Hughes, Chief Justice, at Trenton, this 19th day of September, 1978.

STEPHEN W. GOUNAUD
Clerk

APPENDIX C**Judgment of Conviction Entered by the Trial Court**

(Filed—December 17, 1976)

SUPERIOR COURT OF NEW JERSEY
MONMOUTH COUNTY—LAW DIVISION

(Criminal)

Indictment No. 1510-75
(cts. 1, 2)

STATE OF NEW JERSEY,

vs.

EVELYN LOWITT,

Defendant.

The defendant being charged on June 23, 1976, on Indictment No. 1510-75, for the crimes of Murder (N.J.S. 2A:113-1 and N.J.S. 2A:113-2); (ct. 1); Conspire to Commit Murder (N.J.S. 2A:98-1) (ct. 2); and the defendant on July 1, 1975, having entered a plea of Not Guilty, and thereafter on November 17, 18, 19, 22, 23, and 24, 1976, having been tried with a Jury and a verdict of Guilty as to each of counts one and two of the Indictment having been rendered on November 24, 1976;

Appendix C

It is, therefore, on November 24, 1976;

ORDERED and ADJUDGED that the defendant be and is hereby sentenced to the New Jersey Correctional Institution for Women at Clinton for the rest of her natural life on count one of the Indictment. (Murder); and

It is, therefore, on December 17, 1976;

ORDERED and ADJUDGED that the defendant be and is hereby sentenced to the New Jersey Correctional Institution for Women at Clinton for a term of not less than two years and not more than three years on count two of the Indictment to run consecutively to Life sentence now being served. No credit.

REASONS FOR SENTENCE IMPOSED: Any lesser punishment would deprecate the seriousness of the crimes committed; the defendant is in need of correctional services that can be provided effective only in an institutional setting, and such services are reasonably available; imprisonment of some who had done what this defendant did is necessary to achieve socially justified deterrent purposes, and the punishment of this defendant is an appropriate vehicle to that end.

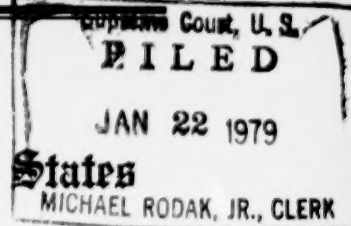
LOUIS R. AIKINS
Judge, Superior Court

Entered:

JOHN R. FIORINO
County Clerk

December 17, 1976

IN THE
Supreme Court of the United States
OCTOBER TERM, 1978



No. 78-949

EVELYN LOWITT,
Petitioner,

vs.

STATE OF NEW JERSEY,
Respondent.

**On Petition for Writ of Certiorari to the Superior Court
of New Jersey, Appellate Division**

BRIEF IN OPPOSITION

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Respondent.

**On Petition for Writ of Certiorari to the Superior Court
of New Jersey, Appellate Division**

BRIEF IN OPPOSITION

Opinions Below

The New Jersey Supreme Court's order denying petitioner's petition for certification appears in petitioner's appendix, page 5. The opinion of the Superior Court of New Jersey, Appellate Division, not reported, appears in petitioner's appendix, pages 1 to 4. The text of the Appel-

late Division's opinion refers to a supplemental point raised by petitioner before the Appellate Division, but not before this Court. As to the issue raised in the instant petition, the Appellate Division summarily affirmed, pursuant to New Jersey R. 2:11-3(e)(2).

Statutes and Rules Involved

N.J.S.A. 2A:113-1. Murder

If any person, in committing or attempting to commit arson, burglary, kidnapping, rape, robbery, sodomy or any unlawful act against the peace of this State, of which the probable consequences may be bloodshed, kills another, or if the death of anyone ensues from the committing or attempting to commit any such crime or act; or if any person kills a judge, magistrate, sheriff, constable or other officer of justice, either civil or criminal, of this State, or a marshal or other officer of justice, either civil or criminal, of the United States, in the execution of his office or duty, or kills any of his assistants, whether specially called to his aid or not, endeavoring to preserve the peace or apprehend a criminal, knowing the authority of such assistant, or kills a private person endeavoring to suppress an affray, or to apprehend a criminal, knowing the intention with which such private person interposes, then such person so killing is guilty of murder.

N.J.S.A. 2A:113-2. Degrees of murder; designation in verdict

Murder which is perpetrated by means of poison, or by lying in wait, or by any other kind of willful, deliberate and premeditated killing, or which is com-

mitted in perpetrating or attempting to perpetrate arson, burglary, kidnapping, rape, robbery or sodomy, or which is perpetrated in the course or for the purpose of resisting, avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, or murder of a police or other law enforcement officer acting in the execution of his duty or of a person assisting any such officer so acting, is murder in the first degree. Any other kind of murder is murder in the second degree. A jury finding a person guilty of murder shall designate by their verdict whether it be murder in the first degree or in the second degree.

N.J.S.A. 2A:98-1. Conspiracy

Any 2 or more persons who conspire:

- a. To commit a crime; or
- b. Falsely and maliciously to indict another for a crime, or to procure another to be charged or arrested; or
- c. Falsely to institute and maintain any suit; or
- d. To cheat and defraud a person of any property by any means which are in themselves criminal; or
- e. To cheat and defraud a person of any property by any means which, if executed, would amount to a cheat; or
- f. To obtain money by false pretenses; or
- g. To conceal or spread any contagious disease; or
- h. To commit any act for the perversion of obstruction of justice or the due administration of the laws—

Are guilty of a conspiracy and each shall be punished, in the case of a conspiracy to commit a crime involving the possession, sale or use of narcotic drugs, as for a high misdemeanor and in all other cases, as for a misdemeanor.

N.J.S.A. 2:81-20. Witness from another state summoned to testify in this state

If a person in any state, which by its laws has made provision for commanding persons within its borders to attend and testify in criminal prosecutions, or grand jury investigations commenced or about to commence, in this state, is a material witness in a prosecution pending in a court of record in this state, or in a grand jury investigation which has commenced or is about to commence, a judge of such court may issue a certificate under the seal of the court stating these facts and specifying the number of days the witness will be required. Said certificate may include a recommendation that the witness be taken into immediate custody and delivered to an officer of this state to assure his attendance in this state. This certificate shall be presented to a judge of a court of record in the county in which the witness is found.

If the witness is summoned to attend and testify in this state he shall be tendered the sum of 10 cents a mile for each mile by the ordinary traveled route to and from the court where the prosecution is pending, and \$5 for each day that he is required to travel and attend as a witness. A witness who has appeared in accordance with the provisions of the summons shall not be required to remain within this state a longer period of time than the period

mentioned in the certificate, unless otherwise ordered by the court. If such witness, after coming into this state, fails without good cause to attend and testify as directed in the summons, he shall be punished in the manner provided for the punishment of any witness who disobeys a summons issued from a court of record in this state.

New Jersey Rule 2:11-3 (e) (2)

Criminal Appeals. When in a criminal appeal the Appellate Division determines that some or all of the issues raised by the defendant are clearly without merit, the court may affirm by an opinion which, as to such issues, specifies them and quotes this rule and paragraph.

New Jersey Rule 3:13-3 (a) (7)

Discovery by the Defendant. Upon written request by the defendant, the prosecuting attorney shall permit defendant to inspect and copy or photograph any relevant names and addresses of any persons whom the prosecuting attorney knows to have relevant evidence or information including a designation by the prosecuting attorney as to which of those persons he *may* call as witnesses.

New Jersey Evidence Rule 63(4). Spontaneous and contemporaneous statements

A statement is admissible if it was made (a) while the declarant was perceiving an event or condition which the statement narrates, describes or explains, or (b) while the declarant was under the stress of a nervous excitement caused by such perception, in reasonable proximity to the event, and without opportunity to deliberate or fabricate.

Statement of the Case

Monmouth County Indictment No. 1510-75, filed on June 13, 1976, charged petitioner herein, Evelyn Lowitt, with: count one, the murder of Oscar Lowitt, N.J.S.A. 2A:113-1 and 2, and count two, conspiracy to murder, N.J.S.A. 2A:98-10. Defendant was tried before the Honorable Louis R. Aikins, J.S.C., and a jury on November 17 through 24, 1976, and was found guilty of first degree murder and conspiracy.

The State's proofs were that defendant hired two race-track grooms, O'Neal Davis and Sylvester Cholmondeley to kill her husband. Vanessa Williams, a friend of Davis', was also involved. Mrs. Lowitt resented her husband's maintenance of a girlfriend in Florida.

The actual shooting was done by Cholmondeley, in the presence of Davis and Williams, Davis accepted some of the payment and he and Williams helped to set up the killing.

O'Neal Davis pleaded guilty to conspiracy to commit murder. He testified for the State at the trials of Sylvester Cholmondeley, Vanessa Williams and petitioner herein, Evelyn Lowitt, in return for the dismissal of the murder charge against him.

A jockey named Manuel Cedeno had witnessed the shooting, and he gave a statement including a description of the perpetrator to police at the scene. Mr. Cedeno testified at the trial of Cholmondeley, who was convicted on charges similar to those against petitioner. Cedeno's name had been given to defense counsel in discovery as a *potential* state witness, pursuant to New Jersey Rule 3:13-3(a)(7). The State in the instant case did not call Cedeno as a witness, and the defense on November 18, 1976, began

an attempt to secure Cedeno's presence by use of N.J.S.A. 2A:81-20.* After the State had rested its case and after the defense had called all of its available witnesses, the defense moved for a continuance in order to secure Cedeno's presence in court (transcript of November 23, 1976). In Florida, Cedeno had yet to be served with an order compelling his appearance and testimony at the New Jersey trial. Defense counsel argued that a Broward County deputy sheriff had assured him that Cedeno would be served with the order no later than that evening, November 23, 1976.

Defense counsel contented that Cedeno was a necessary and material witness because a statement he gave to the police describing the triggerman allegedly did not fit the description of Cholmondeley. The defense speculated that O'Neal Davis may have been the triggerman, and they wanted Cedeno in court to support their theory, thus attacking O'Neal Davis's credibility. Cedeno also claimed to have heard the victim say that he knew the killer. The trial judge had initially signed a certification, pursuant to the interstate act, which stated that Cedeno was a material witness. This certification was made by the court on the basis of a defense representation that Cedeno was material. The court had not inquired into the reasoning behind counsel's representation at the time he signed the certification (1R10-4 to 25).** Once the defense reasoning was known to the court, the judge ruled that he had erred in describing Cedeno as a material witness.

* N.J.S.A. 2A:81-19 *et seq.* known as the "Uniform Act to Secure the attendance of Witnesses from within or without a state in criminal proceedings" contemplates, by its terms, only the production of witnesses who are "material."

** 1R refers to the record below, transcript of November 23, 1976,

The judge ruled that Cedenó was not a material witness. His testimony would be used collaterally to affect credibility and not directly to exculpate. Even though the defense argued that the testimony could go to Davis's motive for falsely testifying, the court felt that in either event Davis was a principal and in either case he had immunity from prosecution (1R26-4 to 1R27-21). The judge also noted that in Cholmondeley's trial when Cedenó testified, he identified Cholmondeley as the gunman even though O'Neal Davis was standing next to Cholmondeley in court (1R17-6 to 18). So, the chance of affecting O'Neal Davis's credibility was very remote.

Although Manuel Cedenó did not testify at petitioner's trial, Officer Donald Pignitore, who had earlier testified concerning his appearance at the motel shortly after the shooting and his on-the-scene conversation with Cedenó (R78-15 to R79-24), was recalled to the witness stand. He told the jury that Cedenó told him that he saw the shooting, and he repeated Cedenó's description of the shooting, the killer, and the getaway (R979-10 to R983-24). The court allowed this testimony under the hearsay exception of New Jersey Evidence R. 63 (4).

Petitioner contends that besides attacking the credibility of O'Neal Davis she hoped to establish through Manuel Cedenó that the victim was killed during a robbery. A careful perusal of the transcript for the motion for adjournment fails to reveal any such trial strategy. *Upon questioning, defense counsel conceded to the court that Cedenó's testimony could not directly exculpate by showing petitioner was not a conspirator or did not cause the trigger to be pulled* (R14-1 to R15-18). There was no allegation that Cedenó would or could testify as to having witnessed a robbery. The robbery defense was to be developed by petitioner's testimony and by the discrediting of the state's testimony. The court in ruling on the motion

for adjournment said, ". . . [W]hat has come before this Court by way of what the testimony of Mr. Manuel Cedenó would be is basically, possibility of contradiction of O'Neal Davis as to whether he was the triggerman or not. Nothing that has been proffered by way of possible testimony of Manuel Cedenó could establish that they were in the process of a robbery." (1R43-11 to 18).

The trial judge additionally ruled that the defense had not been diligent in securing Cedenó's presence in court, because it should have made application well prior to the beginning of trial (1R54-8 to 22). Petitioner states that she "fully expected" Cedenó to be produced by the State. The State cannot be held accountable for such an expectation. The prosecutor was in fact surprised that the defense would want to call Cedenó as a witness (R584-1 to 2). No one associated with the defense had ever interviewed Cedenó (1R4-5 to 8) and only during trial had the full transcript of Cedenó's prior testimony been ordered by the defense (1R3-8 to 25).

The judgment of conviction for murder was entered on November 24, 1976, and petitioner was sentenced to life imprisonment at the New Jersey Correctional Institution for Women at Clinton. The judgment of conviction for conspiracy was entered on December 17, 1976, and petitioner was given a consecutive term of not less than two nor more than three years at the same institution. A motion for new trial was heard and denied on January 7, 1976. The Appellate Division affirmed petitioner's convictions on June 19, 1978, and the New Jersey Supreme Court denied her petition for certification on September 19, 1978. Petitioner was admitted to bail pending the disposition of her petition for certification and her bail has been continued pending the disposition of the instant Petition.

REASONS FOR DENYING CERTIORARI

POINT I

The trial court's refusal to adjourn the trial pending the production in court of Manuel Cedenó was proper.

The fact that Cedenó was not a material witness in this case compels the conclusion that petitioner was denied no constitutional rights by his absence. As noted, N.J.S.A. 2A:81-20 provides for the production only of "material" witnesses. Petitioner does not contest the constitutionality of the statute. Indeed, the statute authorizes precisely the remedy which petitioner claims to seek, *i.e.*, the production of a material witness. The statute is thus in accord with this Court's holdings in *Washington v. Texas*, 388 U.S. 14, 87 S. Ct. 1920 (1967) and *Chambers v. Mississippi*, 410 U.S. 284, 93 S. Ct. 1038 (1973). However, since Manuel Cedenó is not a material witness, petitioner does not come within the purview of the statute or this Court's prior holdings.

It is also clear that the denial of a continuance is not a constitutional issue. Rather, it is a matter of State practice, and the trial court's discretion. In New Jersey, the grant or denial of a continuance is

a matter exclusively within the province and sound discretion of the trial judge, and should not be upset unless it appears from the record that the defendant suffered manifest wrong or injury. *State v. Lamb*, 125 N.J. Super. 209, 213, 310 A.2d 102, 104 (App. Div. 1973)

Accord, *State v. Smith*, 87 N.J. Super. 98, 105, 208 A.2d 171, 175 (App. Div. 1965). Moreover, it has been held that

a criminal defendant will not be entitled to a continuance for the purpose of obtaining the appearance of a defense witness unless it is established not only that defendant will be prejudiced by the witness's nonappearance, but also that a determined effort has been made to have the witness appear. *State v. Kyles*, 132 N.J. Super. 397, 401-403, 334 A.2d 44, 47 (App. Div. 1975); *State v. Smith*, 66 N.J. Super. 465, 468, 169 A.2d 482, 484 (App. Div. 1961), *aff'd* 36 N.J. 307, 177 A.2d 561 (1962).

The State submits that in the instant case under all the circumstances the trial court fairly and soundly exercised its discretion not to grant a continuance. The witness was not material to the defense. The witness was not within the jurisdiction of the court, had not been served with an order to show cause, and was not likely to come shortly within the court's jurisdiction. And, the defense had not been diligent prior to trial in trying to secure the witness's presence.

The reasonableness of the trial court's ruling is not altered by constitutional considerations.

A defendant does have the right to present a defense. In *Washington v. Texas*, 388 U.S. 14, 87 S.Ct. 1920 (1967) this Court held that the Sixth Amendment right of an accused to have compulsory process for obtaining defense witnesses was applicable to the states through the Due Process Clause of the Fourteenth Amendment. The *Washington* case invalidated two Texas witness statutes which prohibited all persons charged or convicted as co-participants in the same crime from testifying for one another, regardless of the relevancy and materiality of their proffered testimony. The Court stated that the right of an accused to have compulsory process will be deemed violated when a state rule arbitrarily prevents whole categories of defense witnesses from testifying on the basis of irrational pre-classification. *Id.* at 22, 23, 87 S.Ct. at 1925.

Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038 (1973) reaffirmed this right of compulsory process and explicitly said that it was not fashioning a new principle of constitutional law or imposing a new evidentiary rule on the state courts. In *Chambers* a man, McDonald, issued a confession which was transcribed, signed, and witnessed, stating that he and not Chambers had shot a policeman to death. McDonald then repudiated his sworn confession at a preliminary hearing. The written confession was admitted at Chambers' trial when the defense called McDonald to the witness stand. The trial court refused, however, to let Chambers' attorney directly challenge McDonald's recantation of the confession (through the testimony of witnesses to whom McDonald had confessed previously) because state evidence rules would not allow a party to impeach his own witness. The *Chambers* Court held that due process of law demands that a state prisoner be allowed to present witnesses in his own defense when there exists "persuasive assurances of trustworthiness" in the proffered testimony and said testimony is "critical" to the defense. The *Chambers* Court would not allow the hearsay rule to defeat the ends of justice for which it was created.

Nothing in *Washington* or *Chambers* suggests that the trial court in the case at bar acted against constitutional imperatives. Neither case addressed itself to a situation where the witness was not material and not within the jurisdiction of the court. Even *People v. Foy*, 32 N.Y.2d 473, 299 N.E.2d 664 (1973), cited by petitioner supports the State's position.

In *Foy* the court reiterated three standards for determining motions for trial continuances to obtain the presence of witnesses: ". . . (1) that the witness is really material and appears to the court to be so; (2) that the party who applies has been guilty of no neglect; (3) that

the witness can be had at the time to which the trial is deferred." *Id.* at 475, 299 N.E.2d at 666. Noting that an adjournment request is addressed to the sound discretion of the court, the *Foy* court said that only when the delay is requested to insure a fundamental right should it be granted liberally. It cautioned that it was not creating a mechanical rule. "Nor should the court be required to permit the prosecution to lapse pending the return of a witness from a foreign jurisdiction, or a fugitive hide-a-way . . . But when the witness is identified to the court, and is to be found within the jurisdiction, a request for a short adjournment after a showing of some diligence and good faith should not be denied because of possible inconvenience to the court and others." *Id.* at 477, 299 N.E.2d at 668.

Obviously petitioner in the instant case fails to meet any of the *Foy* criteria. Instead of a short one-day delay as in *Foy*, petitioner here requested at least 2 trial days, creating a minimal lapse of five days before the resumption of trial because of the holiday and weekend. Moreover, there was no guarantee that the witness would have appeared at that time. Petitioner had been guilty of pre-trial neglect in not attempting to secure Cedeno as a witness. Moreover, Cedeno's testimony would not have been material, unlike the situation in *Foy* where the witness was an alibi witness and held the key to the defense itself. Finally, petitioner here was asking for "the prosecution to lapse pending the return of a witness from a foreign jurisdiction," which practice was specifically disapproved in *Foy*.

On the facts of the case at bar, no constitutional issues are presented.

CONCLUSION

For the reasons set forth herein, it is respectfully urged that the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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